

Message Text

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ACTION EUR-25

INFO OCT-01 EA-11 NEA-10 IO-14 ISO-00 L-03 SS-20 NSC-10

AID-20 CEA-02 CIAE-00 COME-00 EB-11 FRB-02 INR-10

NSAE-00 RSC-01 OPIC-12 SPC-03 TRSE-00 CIEP-02 LAB-06

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TO SECSTATE WASHDC 1947

INFO AMEMBASSY ANKARA

AMEMBASSY ATHENS

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E.O. 11652: N/A

TAGS: EFIN, OECD

SUBJECT: THIRD XCSS EXPERTS MEETING ON INVESTMENT,
FEBRUARY 25-26, 1974

REF: (A) OECD PARIS 1236 (B) DOCUMENT CES 73.117 DEC 18
(C) DOCUMENT CES 74.13 FEB 12 (D) DOCUMENT CES 73.14
FEB 12

1. SUMMARY. BUILDING ON WORK DURING JANUARY SESSION (REFTEL A), THIRD MEETING OF INVESTMENT EXPERTS FURTHER DEFINED CONCEPTS AND CLARIFIED AREAS OF CONSENSUS ON NATIONAL TREATMENT AND ON INTERNATIONAL EFFECTS OF INVESTMENT POLICY MEASURES. ON BASIS DISCUSSION, SECRETARIAT WILL PREPARE NEW DRAFTS ON THESE TWO SUBJECTS FOR CONSIDERATION AT NEXT EXPERTS MEETING WHICH HOPEFULLY WILL BE ABLE TO AGREE ON PROPOSALS TO BE FORWARDED TO XCSS. THERE WAS BRIEF DISCUSSION OF MNC QUESTIONS, BUT SECRETARIAT MADE CLEAR SUBSTANTIVE WORK BY EXPERTS ON THIS SUBJECT COULD NOT BE EXPECTED UNTIL SECOND HALF OF YEAR, AFTER SPECIALIZED COMMITTEES HAVE COMPLETED INITIAL FINDINGS IN ACCORDANCE WORK PROGRAM SET BY OECD COUNCIL. EXPERTS MEETING CONTINUED TO BE CONDUCTED IN RELATIVELY OBJECTIVE AND TECHNICAL MANNER. CHAIRMAN (ABRAMOWSKI) INDICATED THAT SECGEN WILL MAKE PROGRESS REPORT ON INVESTMENT EXERCISE TO XCSS MEETING IN MARCH, BUT WITHOUT ASKING FOR ANY FURTHER GUIDANCE AT THIS STAGE. NEXT XCSS EXPERTS MEETING WILL BE HELD DURING LAST WEEK APRIL. AGENDA WILL CONSIST OF ATTEMPT TO COMPLETE PROPOSALS ON NATIONAL TREATMENT AND INVESTMENT POLICY MEASURES, OF INITIAL EXCHANGE OF VIEWS ON PROCEDURAL ASPECTS OF CONSULTATIONS ON VARIOUS INVESTMENT QUESTIONS AND OF EXPLORING HOW TO DEFINE MNC'S FOR PRACTICAL PURPOSES WHERE SUCH DEFINITION NEEDED, FOR EXAMPLE, IN DATA-GATHERING. ON NATIONAL TREATMENT TOPIC, COUNTRIES HAVE BEEN ASKED TO PROVIDE, BY END OF MARCH, LIST OF LEGAL, REGULATORY AND ADMINISTRATIVE PRACTICES UNDER WHICH FOREIGN-CONTROLLED

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ENTERPRISES NOT NOW BEING GIVEN EQUAL TREATMENT. END
SUMMARY.

2. DISCUSSION OF NATIONAL TREATMENT: REVIEW WAS BASED ON PART I OF REFDOC B AND NEW SECRETARIAT DISCUSSION DOCUMENT (REFDOC C). ASIDE FROM CANADA AND AUSTRALIA, THOSE PRESENT CONTINUED TO SHOW CLEAR WILLINGNESS TO MOVE TOWARD ACCEPTANCE NATIONAL TREATMENT PRINCIPLE,

ALTHOUGH VIEWS STILL DIFFER ON PRECISE DEGREE OF COMMITMENT THAT WOULD BE INVOLVED. (NOTE: FRENCH MISSED NATIONAL TREATMENT DISCUSSION REPORTEDLY DUE ADMINISTRATIVE OVERSIGHT.) U.S. AGAIN POSED QUESTION OF PRECISE SCOPE OF NATIONAL TREATMENT UNDER CONSIDERATION. IT SOON BECAME CLEAR THERE WAS MUCH CONFUSION ON THIS POINT. SECRETARIAT TOOK POSITION THAT TO MAKE PROGRESS EXPERTS SHOULD FIRST LIMIT EXERCISE TO QUESTION OF EQUALITY OF TREATMENT FOR ALL ENTERPRISES LEGALLY OPERATING (AND ALREADY ESTABLISHED) IN A COUNTRY. TO DO OTHERWISE WOULD COMPLICATE DISCUSSION AND INDUCE COUNTRIES TO BRING FORWARD COMPREHENSIVE EXCEPTIONS LIST. ON BASIS THIS SECRETARIAT POSITION, ALL AGREED TO CONFINE PRESENT TERMS OF REFERENCE TO EQUALITY OF TREATMENT OR ENTERPRISES AFTER ESTABLISHMENT. HOWEVER, U.S., DUTCH AND OTHERS NOTED THAT TO EXTENT ESTABLISHMENT NOT COVERED BY CAPITAL MOVEMENTS CODE (CMC) THERE WOULD BE GAP IN COVERAGE OF FOREIGN INVESTMENT AND THAT THIS SHOULD BE POINTED OUT TO XCSS AS TOPIC THAT WOULD REQUIRE FURTHER CONSIDERATION. AS FURTHER CONTRIBUTION TO DISCUSSION ON EXTENT TO WHICH RIGHT OF ESTABLISHMENT NOW COVERED UNDER CMC, OECD LEGAL SERVICE CIRCULATED REVISED DOCUMENT WHICH WILL BE DISCUSSED AT INVISIBLES COMMITTEE MEETING MARCH 11. NEW LEGAL DOCUMENT SUGGESTS THAT CMC CAN BE VIEWED AS CONFERRING RIGHT OF ENTRY IN THE SENSE OF TRANSFER AND INVESTMENT RIGHTS, BUT THAT CERTAIN ADDITIONAL OPERATIONAL RIGHTS COMMONLY ASSOCIATED WITH RIGHT OF ESTABLISHMENT ARE NOT INCLUDED IN CODE. AT FIRST GLANCE, SOME ITEMS IN LIST OF SUCH OPERATIONAL RIGHTS INCLUDED IN LEGAL SERVICES' DOCUMENT, E.G. ACCESS TO COURTS, MIGHT WELL COME WITHIN SCOPE OF ANY NEW UNDERSTANDING ON TREATMENT OF EXISTING LIMITED OFFICIAL USE

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ENTERPRISES. EC COMMISSION OBSERVER, CANADA AND OTHERS, AGAIN REPEATED VIEW THAT CONSIDERATION SHOULD BE GIVEN TO COUNTERPART OBLIGATIONS FOR HOME COUNTRIES OF PARENT COMPANIES. THEY DID NOT DEFINE CONCEPT THEY HAD IN MIND, BUT EC OBSERVER, FOR EXAMPLE, MENTIONED U.S.'S TRADING-WITH-ENEMY ACT AND OFDI RULES WITH REGARD TO REPATRIATION OF PROFITS.

3. SECRETARIAT'S WRITTEN DOCUMENTATION ON NATIONAL TREATMENT OFFERED TWO ALTERNATIVES: ALTERNATIVE A INVOLVING SOFT STATEMENT OF PRINCIPLE AND DECLARATORY EXCEPTIONS, AND ALTERNATIVE B INVOLVING STRONGER STATEMENT OF PRINCIPLE AND CMC-TYPE PROCEDURE FOR RESERVATIONS. SINCE PREVIOUS DISCUSSION HAD SHOWN MAJORITY OF EXPERTS HAD DIFFICULTY WITH AT LEAST SOME ASPECTS OF ALTERNATIVE

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4. BEFORE MEETING, U.S. EXPERTS HANDED SECRETARIAT REQUESTED INFORMAL LIST OF EXCEPTIONS U.S. MIGHT WISH TO MAKE TO AN UNDERSTANDING ON NATIONAL TREATMENT. HOWEVER, THIS LIST BASED ON ASSUMPTION THAT RIGHT OF ESTABLISHMENT INCLUDED IN CONCEPT. WITH SUBSEQUENT CLARIFICATION OF TERMS OF REFERENCE OF EXERCISE, SECRETARIAT HAS ASKED COUNTRY EXPERTS TO SEND IN BY END OF MARCH LIST OF EXCEPTIONS TO EQUALITY OF TREATMENT TO FIRMS LEGALLY OPERATING IN COUNTRY BASED ON CURRENT LEGISLATION, REGULATIONS OR ADMINISTRATIVE PRACTICES. ACCORDINGLY, U.S. PAPER WILL HAVE TO BE REVISED ALONG THESE LINES. WHILE NEW LIST WILL THUS NOT INCLUDE RIGHT OF ESTABLISHMENT AS SUCH, CONSIDERATION WILL HAVE TO BE GIVEN TO TREATMENT OF ESTABLISHED ENTERPRISES WISHING TO EXTEND INTO NEW FIELDS WHERE THERE ARE U.S. RESTRICTIONS.

5. DISCUSSION OF INTERNATIONAL EFFECTS FROM INVESTMENT POLICY MEASURES: EXPERTS CONTINUED TO SHOW BROAD AGREEMENT WITH CONCEPT AND CONSULTATIONS DESCRIBED IN REFDOC B. APART FROM QUESTIONS OF DRAFTING, MAIN ISSUES OF SUBSTANCE CONCERNED (A) WHETHER INVESTMENT POLICIES OF BOTH HOST AND HOME COUNTRIES INCLUDED, (B) SCOPE OF INVESTMENT POLICY CONCEPT, AND (C) NATURE OF CONSULTATIONS. THERE WAS BROAD AGREEMENT THAT, FOR SAKE BALANCE AND LOGIC, INVESTMENT POLICIES OF BOTH HOST AND HOME COUNTRIES SHOULD BE COVERED, ALTHOUGH IN PRACTICE MOST CASES WOULD LIKELY COME UP IN CONTEXT OF HOST COUNTRIES. DISCUSSION ON SCOPE OF CONCEPT AND ON CONSULTATIONS (INCLUDING REPORTING) SHOWED CONCERN BY SOME COUNTRIES THAT VERY BROAD DEFINITION OF INVESTMENT POLICIES MIGHT INVOLVE THEM IN REPORTING AND CONSULTATIONS ON VIRTUALLY ENTIRE RANGE OF ECONOMIC POLICY. U.K. SUGGESTED THAT FOR PURPOSES SPECIFIC CONSULTATIONS, AT REQUEST OF A PARTICULAR COUNTRY, RELATIVELY WIDE DEFINITION OF INVESTMENT POLICIES BY USED, WHILE NARROWER SCOPE DESIRABLE FOR PERIODIC REVIEWS AND NOTIFICATION PURPOSES. THIS SUGGESTION WELL RECEIVED

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AND IN GENERAL THERE SEEMED TO BE LITTLE DISAGREEMENT AS TO DESIRABLE SCOPE OF EXERCISE AND NEED TO INCLUDE BOTH INCENTIVES AND DISINCENTIVES. ON CONSULTATIONS, ALSO APPEARS CLEAR THAT COUNTRIES WILLING TO SUBMIT BOTH TO SPECIFIC REVIEWS AT REQUEST OF COMPLAINANT COUNTRY AND TO PERIODIC REPORTS AND GENERAL REVIEWS. U.S. DELEGATE RECALLED THAT XCSS MANDATE REQUIRED ATTENTION TO TRANSPARENCY AND THAT THIS CONCEPT NOT ADEQUATELY

COVERED IN SECRETARIAT'S NEW DRAFT (REFDOC D). OTHERS SUPPORTED THIS VIEW AND SECRETARIAT INDICATED WOULD TAKE IT INTO ACCOUNT IN REDRAFT.

6. DISCUSSION OF MNC'S: SECRETARIAT STATED WORK PROGRAM ON MNC'S APPROVED BY COUNCIL FOR SPECIALIZED COMMITTEES CALLS FOR PRELIMINARY REPORTS BY JULY 31 ON IDENTIFYING ANY PROMISING AREAS (A) FOR FORMULATING GUIDELINES TO HARMONIZE POLICIES OF GOVERNMENTS AND (B) FOR DRAFTING OF STANDARDS OF BEHAVIOR FOR COMPANIES. ABRAMOWSKI REPORTED THAT CONTACTS WITH BIAC AND TUAC STILL AT PRELIMINARY STAGE AND BIAC HAS ESTABLISHED SPECIAL MNC COMMITTEE HEADED BY SIR MICHAEL CLAPHAM OF U.K. ABRAMOWSKI SAID HE HAD IMPRESSION BIAC WILL PREFER TO REACT TO SUGGESTIONS COMING FROM OECD RATHER THAN MAKING SUGGESTIONS OF ITS OWN. HE NOTED THAT TUAC WILL BE MUCH MORE INCLUDED TO INITIATE PROPOSALS. APPARENT THAT XCSS INVESTMENT EXPERTS WILL NOT BE REQUIRED TO ENGAGE IN SUBSTANTIVE WORK ON MNC'S UNTIL NEXT FALL AFTER SPECIALIZED COMMITTEES HAVE MADE THEIR REPORT TO COUNCIL. SECRETARIAT WILL, HOWEVER, CIRCULATE BRIEF PAPER NOTING COMMENTS MADE ON MNC GUIDELINES DURING EXPERTS MEETINGS THUS FAR.

7. THERE WAS BRIEF, UNSTRUCTURED DISCUSSION OF MNC PROBLEMS INITIATED BY SWEDISH AND ITALIAN DELEGATES WHO SUGGESTED THAT EXCEPTION TO NATIONAL TREATMENT MIGHT BE APPROPRIATE IN CASE OF MNC'S WHICH DO NOT ADHERE TO AGREED STANDARDS OF BEHAVIOR. SWEDES ALSO ADVANCED IDEA THERE MIGHT BE SOME KIND OF CONSULTATIONS OR "HEARINGS" FOR EXAMINING MNC COMPLIANCE WITH STANDARDS. THERE WAS GREAT DEAL OF CRITICISM OF LINKING NATIONAL TREATMENT TO MNC STANDARDS, PARTICULARLY BY GERMANY, LIMITED OFFICIAL USE
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NETHERLANDS, U.S. AND SECRETARIAT. SECRETARIAT AND OTHERS NOTED, HOWEVER, THAT CONSULTATIONS IN MNC AREA IS QUESTION THAT WILL HAVE TO BE CONSIDERED AT LATER STAGE ONCE SCOPE OF HARMONIZATION OF GOVERNMENTAL POLICIES, ON ONE HAND, AND STANDARDS OF BEHAVIOR FOR COMPANIES, ON OTHER HAND, HAS BEEN CLARIFIED.

8. PROCEDURAL CONCLUSIONS: ABRAMOWSKI INDICATED HE WILL PREPARE PROGRESS REPORT TO XCSS IN MARCH ON INVESTMENT WORK, BUT XCSS WILL NOT BE ASKED
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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 JAN 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: POLICIES, CONSULTANTS, INVESTMENTS, COMMITTEE MEETINGS, MEETING PROCEEDINGS
Control Number: n/a
Copy: SINGLE
Draft Date: 01 FEB 1974
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Authority: golinofr
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1974OECDP05239
Document Source: CORE
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Film Number: n/a
From: OECD PARIS
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1974/newtext/t19740262/aaaacgaa.tel
Line Count: 320
Locator: TEXT ON-LINE
Office: ACTION EUR
Original Classification: LIMITED OFFICIAL USE
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 6
Previous Channel Indicators:
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: n/a
Reference: (A) OECD PARIS 1236 (B) DOCUMENT CES
Review Action: RELEASED, APPROVED
Review Authority: golinofr
Review Comment: n/a
Review Content Flags: ANOMALY
Review Date: 19 MAR 2002
Review Event:
Review Exemptions: n/a
Review History: RELEASED <19 MAR 2002 by garlanwa>; APPROVED <30 APR 2002 by golinofr>
Review Markings:

Declassified/Released
US Department of State
EO Systematic Review
30 JUN 2005

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: THIRD XCSS EXPERTS MEETING ON INVESTMENT, FEBRUARY 25-26, 1974
TAGS: EFIN, OECD
To: STATE
Type: TE
Markings: Declassified/Released US Department of State EO Systematic Review 30 JUN 2005